

United States Attorney's Office
for the
District of Oregon

Criminal Discovery Policy

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes Department of Justice (DOJ) policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. In order to meet discovery obligations in a given case, federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. To that end, the United States Attorney's Office for the District of Oregon (USAO) has adopted this policy for prosecutors regarding criminal discovery.

This policy is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case in which charges have been filed. This policy is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 US. 741 (1979).

National Security Issues: Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the National Security Division (NSD) regarding whether to request a prudential search

of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- *Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;*
- *Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;*
- *Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;*
- *Other significant cases involving international suspects and targets; and*
- *Cases in which one or more targets are, or have previously been, associated with an intelligence agency.*

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

1. **The Prosecution Team:** Determining which agents and/or agencies are part of the prosecution team enables AUSAs to fulfill their obligation to locate and disclose discoverable information. The prosecution team includes all federal, state, tribal and local law enforcement agents and officials participating in the investigation and prosecution of the criminal case against the defendant. The

prosecution team will generally include any state, tribal or federal agent or agency that participates materially in the federal criminal investigation, or whose actions are supervised or controlled by the AUSA. Documents generated by an agent or agency that are in AUSA files are subject to review and production. In determining whether an agent or agency is part of the prosecution team AUSA's will take an expansive view while generally considering:

- a. Whether federal, state, tribal or local agents are working on behalf of any AUSA or are under an AUSA's control.
- b. The extent to which federal, state, tribal and local agencies, civil and/or criminal, are part of a team, are part of a joint or parallel investigation, or are sharing resources and/or information.
- c. Whether and to what extent an AUSA has direct access to the evidence.

2. **What Must Be Reviewed for Disclosure:** In order to satisfy the USAO's discovery obligations, AUSAs will gather and review all case-related reports and evidence collected or generated by agencies that are part of the prosecution team, and copy and/or provide all items appropriate for discovery to the defense. Materials subject to review include but are not limited to:

- a. Investigative agency files.
- b. Confidential informant, witness, human source files: AUSAs will request access to complete CI source files (not just files related to the case at issue) and personally review the files for relevant, discoverable information. AUSAs will review all proffers, immunity agreements or other benefits extended to the CI/source. If such materials give rise to privacy or security concerns, AUSAs will consider disclosing the information via a summary letter to defense counsel rather than providing such records in their entirety.
- c. Evidence and information gathered during the investigation.

- d. Documents or evidence gathered in parallel civil investigations by civil attorneys and/or regulatory agency staff who are part of the prosecution team.
- e. Substantive case-related communications, including emails and voice mail which may contain factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims and factual issues relating to credibility. Generally, communications involving case impression or investigative/prosecution strategies, without more, will be protected by the work-product privilege and not subject to discovery.
- f. Potential *Giglio* impeachment information relating to law enforcement witnesses and non-law enforcement witnesses.
 - i. Non-Law Enforcement Witnesses: AUSAs will gather and review potential *Giglio* information regarding lay witnesses, including criminal history reports. If the Portland Police Bureau (PPB) is part of the prosecution team, review should include all reports of PPB law enforcement contacts with such witnesses. AUSAs will gather and review evidence of benefits or consideration provided to a witness - including payments, other assistance, dropped charges, immunity, immigration benefits, downward departures or motions for reduction of sentence.
 - ii. Henthorn Material: If an AUSA determines that discovery from the personnel file of a member of the prosecution team is sought or will be needed for a federal proceeding, the AUSA will make a prompt discovery request to the agency involved pursuant to the Brady/Giglio Policy of the USAO. Questions or issues should be directed to the District Henthorn Coordinator.

- g. Information obtained in witness interviews including ongoing duty to disclose variations in statements and new or inconsistent statements.
- h. Agents' notes and/or AUSA notes upon allegation or reason to believe a discrepancy exists in interview reports.
- i. Potential *Giglio* impeachment information contained in Pre-Sentence Reports (PSRs) of convicted defendants who may testify, where such information is known by, or the PSR is in the custody or control of, the prosecution team.

3. **What Must Be Disclosed:** AUSAs generally will provide broader and more comprehensive discovery than is legally required except where countervailing considerations discussed in this policy apply, including the need to protect the identity of informants, and to ensure the safety of witnesses. To that end, AUSAs may notify the defense that the government is electing to provide discovery beyond that which is legally required but should never describe the government's discovery as "open file" or make similar representations. Use of such a term is imprecise, and could lead to an accusation of misrepresentation about the scope of discovery provided where there is an inadvertent failure to disclose, or disagreement about the meaning of the term "open" and/or "file."

Upon review of prosecution team materials, AUSAs will disclose all discoverable information, including the following general categories, except where countervailing considerations discussed in this policy apply, including the need to protect the identity of informants, and to ensure the safety of witnesses. **Any decision to depart from the disclosure requirements of this policy requires supervisory approval.**

- a. Rule 16 evidence and information.
- b. Potential exculpatory information under *Brady*.
- c. Potential impeachment information under *Giglio*.
- d. Witness statements under FRCP 26.2 and the Jencks Act.

4. **Timing of Disclosure:**

- a. Except as provided in section 4(b) AUSAs will provide discovery, including witness statements and interview reports, promptly after first appearance and the appointment of counsel consistent with this policy and pursuant to relevant statutes, rules and/or court order. Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after it is discovered. Impeachment information developed subsequent to initial discovery, and which depends on the prosecutor's decision on who is or may be called as a government witness, will be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. See USAM § 9-5.001. AUSAs will provide ongoing discovery in a timely manner as required by law and policy.
- b. Drug and Violent Crime Cases: Such cases frequently involve witness and victim security issues, privacy concerns, and ongoing investigations. In such cases disclosure of interview reports, witness statements and impeachment information may be delayed to just prior to trial.

5. **Non-Disclosure, Redaction and Protective Orders:** Questions or concerns regarding the decision to redact or withhold will be directed to a supervisor. AUSAs will redact and/or withhold materials not subject to discovery based on the following considerations:

- a. Whether disclosure could affect the integrity of any ongoing investigation, witness security, and/or national security, or implicates any of the countervailing considerations discussed in this policy.
- b. Work Product: AUSAs will not waive or depart from the non-disclosure provisions of Rule 16(a)(2) relating to attorney work product, including case impressions and investigative or prosecution strategies. If work product contains information

otherwise subject to disclosure under Rule 16, Jencks, or *Brady/Giglio*, then the attorney work product portion will be redacted prior to disclosure.

- c. Personal Identifying Information (PII): PII will be redacted, or the AUSA will seek a protective order to limit its use and dissemination.
- d. Protective Orders: Where redaction is not practical, or where otherwise appropriate, AUSAs will seek a protective order limiting use and disclosure of PII or other sensitive information.
- e. Emails and Voice Mails: Discoverable information contained in an email, text message or voice mail that is not otherwise documented in a report may be disclosed in a redacted or alternative form (e.g., summary letter or memo) in appropriate circumstances. Redaction will be considered if an email, text-message or voice mail contains a mix of substantive, potentially privileged, and/or other non-discoverable information.

6. Special Issues:

- a. Format of Information: With few exceptions, the format of information does not determine whether it is subject to discovery. E-mails, text messages, voice mails or other electronic communications that contain substantive case information that is discoverable will be preserved in a manner that associates them with the case or investigation so that discovery obligations may be met. USAO personnel and agents will refrain from using email, text messages and voice mail to communicate substantive case information in criminal and parallel criminal/civil cases. AUSAs will advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases will be in the form of a formal investigative report, and not in the form of

email, text message or voice mail.

- b. Agent and AUSA Notes:
 - i. Witness interviews: Agent and AUSA rough notes made during witness interviews are generally not discoverable where the substance of the information has been reproduced in a written report. Agent rough notes will be preserved so any issue of material discrepancy in any report can be addressed. If an AUSA has reason to believe that there is a discrepancy between agent or AUSA notes, on the one hand, and an official report on the other, the AUSA will review the notes and disclose to defense counsel any material discrepancies.
 - ii. Witness preparation: There is generally no requirement to create reports of trial preparation meetings with witnesses. However, during such meetings with witnesses AUSAs should be alert for new or inconsistent information disclosed by the witness. New information that is exculpatory or impeachment information will be disclosed. Similarly, statements which are materially inconsistent with a prior statement(s) will be disclosed.
- c. Witness Contacts: AUSAs will not communicate with a witness on case-related matters, in person or by phone, without an agent or other neutral witness present. AUSAs will ensure that an agent or neutral witness is the primary note-taker.
- d. Victim-Witness Personnel: AUSAs and other USAO personnel who interact with victims and witnesses will limit email and other electronic communication exchanges to non-substantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, AUSAs will direct agents to limit email and other electronic communication exchanges with victims or witnesses to non-substantive matters. Any substantive case information received from a

victim or witness, regardless of form, will be considered potential Jencks Act material and maintained for Brady/Giglio review. If USAO personnel other than the AUSA receives an email, text message or voice mail containing substantive case information from a victim or witness, the communication will be forwarded to the AUSA(s) assigned to the investigation or case and treated in a manner consistent with this policy.

- e. Continuing Obligation: AUSAs have a continuing obligation to update discovery with any relevant, new material discovered or generated by the prosecution team. This obligation includes the duty to produce and disclose any material changes in a witness statement or testimony.

7. **Documentation**: AUSAs will ensure that a complete and accurate record of discovery is maintained. This office has adopted a comprehensive method for producing and documenting discovery in a criminal case. Discovery consisting of reports and documentary evidence will generally be provided in electronic form and Bates stamped and logged using standard office protocols. Electronic data will be converted from native format to PDF format or otherwise processed to protect the integrity of the data. AUSAs will not transmit or disclose to the defense any electronic data by email or otherwise which has not been processed to protect the integrity of the data (See Discovery Guidelines dated 7/2/08 - S:\Criminal Forms). Questions regarding discovery document format should be directed to Automated Litigation Support (ALS) staff.

Discovery not suitable for conversion to electronic form will be made available for inspection and photocopying. A large volume of documentary evidence may be provided via inspection and photocopying on a case-by-case basis where electronic discovery is impractical or the cost of conversion to electronic form outweighs the benefit and convenience of electronic discovery. AUSAs will ensure that in every case:

- a. Support personnel transfer, Bates stamp, and copy all discovery materials onto electronic media.
- b. Redaction is accomplished where appropriate. *See*, Section 5.

- c. Discovery is transmitted to defense counsel with a transmittal letter documenting the contents of the discovery and the date of dissemination.
- d. All discovery is accurately reproduced, numbered and logged and that a discovery log is kept in every case.
- e. Where discovery is made available for inspection and photocopying, a log of such activity is kept.